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MAY 12 2005

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TO:**FROM:**

Name: Mail Stop AMENDMENT
Group Art Unit 3764/Examiner Michael Brown

Name: Thomas H. Martin, Esq.

Firm: U.S. Patent & Trademark Office

Phone No.: 330-877-2277

Fax No.: 703-872-9306

No. of Pages (including this): 6

Subject: U.S. Patent Application No. 09/497,590
Gary K. Michelson, M.D.

Date: May 12, 2005

Filed: June 6, 2000

Confirmation Copy to Follow: NO

APPARATUS INCLUDING A GUARD MEMBER
HAVING A PASSAGE WITH A NON-
CIRCULAR CROSS SECTION FOR
PROVIDING PROTECTED ACCESS TO THE
SPINE (as amended)

Attorney Docket No. 101.0044-03000

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Message:

CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8

I hereby certify that the attached Transmittal Form (in duplicate; \$120.00 total amount to cover the one-month extension fee is to be charged to Deposit Account No. 50-1066) and Reply to Office Action are being facsimile transmitted to the U.S. Patent and Trademark Office on May 12, 2005.


Sandra L. Blackmon

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FORM PTO-1083

Attorney Docket No.: 101.0044-03000
Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

Gary Karlin Michelson, M.D.

Serial No: 09/497,590

Filed: June 6, 2000

For: APPARATUS INCLUDING A GUARD
MEMBER HAVING A PASSAGE
WITH A NON-CIRCULAR CROSS
SECTION FOR PROVIDING
PROTECTED ACCESS TO THE
SPINE (as amended)

Confirmation No.: 7688

Group Art Unit: 3764

Examiner: Michael Brown

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MAY 12 2005Mail Stop AMENDMENT
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Dear Sir:

Transmitted herewith is a Reply to the Office Action dated January 12, 2005 in the above-identified application.

No additional fee is required.

Applicant hereby requests a one-month extension of time to respond to the above office action.

The total amount of \$120.00 to cover the one-month extension of time fee is to be charged to Deposit Account No. 50-1066.

The Commissioner is hereby authorized to charge any deficiencies of fees associated with this communication or credit any overpayment to Deposit Account No. 50-1066. A copy of this sheet is enclosed.

Any filing fees under 37 C.F.R. § 1.16 for the presentation of extra claims

Any patent application processing fees under 37 C.F.R. § 1.17

Respectfully submitted,
MARTIN & FERRARO, LLP

05/13/2005 EABUBAK1 00000051 501066 09497590

01 FC:1251 120.00 DA

Date: May 12, 2005

By: 
Thomas H. Martin
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Hartville, Ohio 44632
Telephone: 330-877-0700
Facsimile: 330-877-2030

PATENT
 Attorney Docket No. 101.0044-03000
 Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)
 Gary K. Michelson, M.D.)
 Serial No.: 09/497,590) Confirmation No.: 7688
 Filed: June 6, 2000)
 For: APPARATUS INCLUDING A) Group Art Unit: 3764
 GUARD MEMBER HAVING A) Examiner: Michael Brown
 PASSAGE WITH A NON-)
 CIRCULAR CROSS SECTION)
 FOR PROVIDING PROTECTED)
 ACCESS TO THE SPINE (as)
 amended))

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 MAY 12 2005

Mail Stop AMENDMENT
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

Sir:

REPLY TO OFFICE ACTION

In reply to the Office Action dated January 12, 2005, the period for reply having been extended for one month by a request for extension and fee payment filed concurrently herewith, the following remarks are submitted:

In the Office Action, the Examiner objected to claims 130 and 169 as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The Examiner rejected claims 105-115, 121-125, 127-129, 131, 132, 134-141, 143, 144, 146, 147, 149-165, 167, 168, 170, 171, 173-180, 182, 183, 185, and 186 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,878,915 to Brantigan ("Brantigan"). Applicant respectfully traverses the Examiner's rejection. Independent claim 105 recites a guard having a passage with a width and a height, "the width of said passage being greater than the height of said passage along at least a

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Application No. 09/991,579
Reply to Office Action dated May 12, 2005
Reply to Office Action of January 12, 2005

portion of said passage." Independent claim 149 recites a guard having a passage, "said passage having a non-circular cross section along at least a portion of the mid-longitudinal axis."

Brantigan teaches a sleeve 22 configured for use with a rotary drill. (Brantigan, col. 5, lines 41-46; Fig. 4). Brantigan does not teach or suggest a guard with a passage having a width that is greater than its height; or a guard with a passage having a non-circular cross section as recited in independent claims 105 and 149, respectively.

Moreover, independent claims 105 and 149 recite an extension with a portion "having an upper surface adapted to contact one of the adjacent vertebral bodies and a lower surface adapted to contact the other of the adjacent vertebral bodies, said portion of said extension having a height between said upper and lower surfaces and a length sufficient to properly align and distance apart the adjacent vertebral bodies." The Examiner contends that Brantigan discloses "extension portions (the portions of 22 that extends outward near 23 but don't including 23)." (Office Action, page 2, paragraph 4). The portion of sleeve 22 that the Examiner refers to does not have a height as claimed in independent claims 105 and 149. (See, e.g., Brantigan, Fig. 4). Accordingly, Applicant respectfully submits that the rejection of claims 105-115, 121-125, 127-129, 131, 132, 134-141, 143, 144, 146, 147, 149-165, 167, 168, 170, 171, 173-180, 182, 183, 185, and 186 under 35 U.S.C. § 102(b) cannot be sustained.

The Examiner rejected claims 126, 133, 142, 145, 148, 166, 172, 181, 184, and 187 under 35 U.S.C. § 103(a) as being unpatentable over Brantigan in view of U.S. Patent No. 4,537,185 to Stednitz. Applicant submits that the rejections over claims 126, 133, 142, 145, 148, 166, 172, 181, 184, and 187 are rendered moot at least because they depend from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claims 105 and 149 are patentable and that dependent claims 106-115, 121-48, and 150-187 dependent from independent claims 105 or 149, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, it is respectfully submitted that the claims, as amended, are patentable. Therefore, it is requested that the Examiner reconsider the

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Reply to Office Action dated May 12, 2005
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outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1066.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: May 12, 2005

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